STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2006
v	No. 257986 Oakland Circuit Court
SERGIO VALENCIA, Defendant-Appellant.	LC No. 04-195474-FH

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of a short-barreled shotgun, MCL 750.224(b), possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant argues the prosecution did not present sufficient evidence to support his convictions because the evidence did not show he had possession of the short-barreled shotgun found in his car, and did not show that he "carried" it We review de novo a challenge to a conviction based on the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

First, a person may not possess a short-barreled shotgun or rifle. MCL 750.224(b). Our Supreme Court held that "MCL 750.224(b) . . . was intended to prohibit the constructive and joint possession of short-barreled shotguns." *People v Hill*, 433 Mich 464, 479; 446 NW2d 140 (1989). The Court explained:

> a person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. [*Hill, supra* at 470-471 (internal citation omitted).]

Possession may be proven by circumstantial as well as direct evidence. *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Additionally, the elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Defendant asserts that he did not possess the short-barreled shotgun found in his car, and thus, his convictions for both possession of a short barreled shotgun and felony-firearm must be reversed. In order to demonstrate constructive possession the prosecution must demonstrate that a defendant knew where the gun was and also that it was reasonably accessible to the defendant. *Hill, supra* at 470-471. Officer Hart testified that defendant admitted to touching the weapon found in the back seat of defendant's car, stating that he had moved it from the front of the car to the back. Officer Prough testified that the pistol grip of the gun was visible from outside of the car. From this evidence, we conclude that the prosecution presented sufficient evidence to show defendant knew the location of the gun because it was visible and he admitted he placed the gun in the back of the car. Additionally, Officer Hart testified that defendant would have been capable of reaching back and grabbing the gun while driving because it was stored within arm's reach of the driver's seat. A review of the record reveals that defendant knew the gun's location, and it was reasonably accessible to him. The prosecution presented sufficient evidence of constructive possession to support defendant's conviction for possession of a short-barreled shotgun and felony-firearm. *Hill, supra* at 470-471.

The elements of carrying a concealed weapon in a vehicle, MCL 750.227(2), are: (1) the pistol[1] was in a vehicle operated or occupied by the defendant; (2) the defendant knew that the pistol was in the vehicle; and (3) the defendant took part in carrying or keeping the pistol in the vehicle. *People v Butler*, 413 Mich 377, 384-385; 319 NW2d 540 (1982); *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987); CJI2d 11.1.

Defendant denies both knowledge that the gun was in his car and that he "carried" the gun. The *Butler* Court gave the following factors to consider when determining whether a defendant "carried" a concealed weapon: "(1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle." *Butler, supra* at 390 n 11. The same evidence we discussed above that shows defendant had constructive possession of the gun shows that he "carried" it. The prosecution presented evidence to show that defendant was in close proximity to the weapon, the grip was visible, defendant placed the weapon in the position it was found, and defendant was driving his own vehicle. The prosecution presented sufficient evidence to support defendant's conviction for carrying a concealed weapon.

[1] "'Pistol' means a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals it as a firearm." MCL 28.421(e).

Defendant also asserts, in his appellate brief filed *in propria persona*, that his counsel was ineffective. Defendant failed to file a motion for a new trial or an evidentiary hearing. Therefore, his claim is not preserved. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Michigan Supreme Court rearticulated the standard for ineffective assistance of counsel in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The Court adopted the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

First, defendant asserts his counsel was ineffective because he failed to call, defendant's girlfriend and other unidentified "witnesses" that would have testified in his favor. Decisions regarding whether to call or question witnesses are matters of trial strategy that this Court "will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, the "failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," i.e., a defense that might have made a difference in the outcome of the trial. *Id.* Defendant merely asserts that his girlfriend and other unidentified witnesses would have testified in a manner that would have substantiated his own testimony and fails to identify the substance of any testimony that might have been offered by these witnesses that "would have benefited defendant's case." *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to produce these witnesses, the results of the proceedings would have been different. *Strickland*, *supra* at 694. Further, defendant's argument is not bolstered by the fact that the prosecution subpoenaed defendant's girlfriend to testify and she failed to appear on July 12, 2004.

Second, defendant argues his counsel failed "to file proper motions to substantiate [a] claim of innocence as to defendant's[.]" The record displays that defense counsel moved for a directed verdict asserting that the prosecution's case was "very circumstantial at best" and specifically arguing that the prosecution did not present evidence that defendant possessed the firearm. The trial court denied his motion for a directed verdict finding evidence existed that defendant touched the gun and it was accessible to defendant. Considering that defense counsel

indeed moved for a directed verdict before the trial court, defendant's argument that defense counsel failed to make a proper motion lacks record support and fails.

Finally, defendant argues that his counsel was deficient because he failed to request an interpreter. Under MCL 775.19a, if an accused person appears to the judge to be incapable of adequately understanding the charge or presenting a defense due to the inability to speak or understand the English language, the judge shall appoint an interpreter. Generally, this Court finds an abuse of discretion for the failure to appoint an interpreter when it appears from the record that "the witness was not understandable, comprehensible, or intelligible, and that the absence of an interpreter deprived the defendant of some basic right." *People v Warren*, 200 Mich App 586, 591-592; 504 NW2d 907 (1993). From the record, we are certain defendant did not require an interpreter. Defendant testified with no apparent difficulty answering every question that was asked of him, and never indicated he did not understand or request an interpreter. And, defendant has lived in the United States for 11 years, chose to testify, and reads and writes English well enough to write his Standard 4 Brief on Appeal. Defendant has not demonstrated his counsel's performance was deficient in not requesting an interpreter, or for any other reason.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis